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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1600

STEVE MARSTON, et al.,
Petitioners,

v.

ANN ARBOR PROPERTY MANAGERS, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents oppose the granting of certiorari. No novel or important procedural or substantive questions are presented. The decision below is not in conflict with the decisions of this Court and is fundamentally correct.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Eastern District of Michigan, Southern Division, is officially reported at 302 F. Supp. 1276, and is unofficially reported at 1969 CCH Trade Cases ¶72,862. The *per curiam* opinion of the United States Court of Appeals for the Sixth Circuit is officially reported at 422 F. 2d 836, and is unofficially reported at 1970 CCH Trade Cases ¶73,082.

JURISDICTION

Respondents object to petitioners' jurisdictional statement for the reason that the certified record was not filed within ninety days after the entry of judgment in the Court of Appeals, as required by Supreme Court Rule 22(1). The judgment below was entered on February 20, 1970, but petitioners delayed until April 28, 1970 before requesting the clerk below to certify and transmit the record, which was not received by the Clerk of this Court until sometime after the ninety day period expired on May 21, 1970. Petitioners' application for a time extension, submitted to Mr. Justice Stewart, was dated May 21, 1970, and therefore was not filed within the ten day period of Supreme Court Rule 34(2). In view of the fact that petitioners' said application shows on its face that petitioners delayed more than two months in requesting certification and transmission of the record, the "most extraordinary circumstances" specified by Rule 34(2) were not presented in support of the application. Inasmuch as respondents have not received notice from petitioners that their application was granted, such notice being re-

quired by Supreme Court Rule 34(4), respondents presume that the application has not been acted upon, and respectfully suggest here that the petition for a writ of certiorari is out of time and should be denied.

QUESTION PRESENTED

Whether the two lower courts were correct in holding that the interstate commerce requirements of the Sherman Act were not satisfied where petitioners' complaint alleged that Ann Arbor property managers, in conspiring against Ann Arbor tenants, restrained competition in a segment of the Ann Arbor market for rental apartments.

STATUTES INVOLVED

The applicable sections of the Sherman and Clayton antitrust acts are set forth in the petition.

STATEMENT OF THE CASE

Petitioners' complaint was the extra-curricular project of a group of law students at the University of Michigan law school. It was filed on March 13, 1969 as a tactic in the nationally-publicized Ann Arbor rent strike which was organized by an amorphous student group calling itself the Ann Arbor Tenants Union.[1]

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[1] These facts appear from the exhibits attached to respondents' Motions to Affirm or Dismiss, filed in the Court of Appeals, and from the undenied and uncontroverted allegations of the counterclaim of respondent Summit Associates, filed in the District Court. The rent strike began in February of 1969 and continues into the present.

Claiming to represent "a large and constantly changing class", petitioners "are a small group composed primarily of students at the University of Michigan and young working adults who rent property in the Ann Arbor, Michigan area."[2]

Respondents are three individuals, seven business entities and an alleged trade association.[3] Only two of the respondents are averred to be members of the trade association.[4] The individual defendants are alleged to own rental housing in the relevant market while the organizational defendants are alleged to manage such housing on behalf of third parties. The relevant product is variously described in the complaint as "rental housing" (Complaint, ¶4), "modern apartment units" (¶20), "furnished rental units" (¶18), or "residential apartments" (¶21). The relevant geographic market is the central campus area in Ann Arbor (¶¶18-19).

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[2] Quoted from petitioners' Motion to Dispense with Printing Petition for Certiorari (May 18, 1970), at p. 2. The named petitioners are Steve Martson, Barry Rubin, Johathan Moselle, Helen Cooper, Drew Bogema, Dan Zwerdling, Kurt Wieneke and Laura Magzis. Petitioner Zwerdling, a law student, wrote an article about the rent strike and the instant suit in *The New Republic* (May 31, 1969), a copy of which is appended as Exhibit B to respondents' aforesaid alternative motions in the Court of Appeals.

[3] Ann Arbor Property Managers (Management) Association, John C. Stegeman, Apartments Limited, Inc., Campus Management, Inc., Summit Associates, Charter Realty, J. Patrick Pulte, J. Patrick Pulte, Inc., John W. Conlin, Jr., Wilson White, Wilson White Company, Ann Arbor Trust Company, and J. C. Shipman were named as defendants in the complaint. Two of them are no longer in the suit. Wilson White was not served with process and John W. Conlin, Jr. was dismissed upon stipulation of petitioners' substituted counsel when it was shown that ¶13 of the complaint ("He and his family own a substantial amount of real estate in the relevant market, some of which is rented to members of the complaining class.") was completely false.

[4] John C. Stegeman and J. Patrick Pulte (Complaint, ¶¶ 7, 8 and 12).

Petitioners claim that respondents met to fix rents, exclude competitors and exchange business information in the relevant market.[5] The complaint further claims that all of the alleged effects of those activities occurred only in the relevant market and that competition in that market only was allegedly restrained.[6]

Separate answers were filed by the respondents beginning on April 4, 1969,[7] and each raised the defenses of lack of subject matter jurisdiction and failure to state a claim, under Fed. R. Civ. P. 12, based on the ground that the interstate commerce requirements of the Sherman Act had not been and could not be met. One of the respondents, Summit Associates, filed a counterclaim on April 7, to which no reply was ever proferred by petitioners, despite the fact that notice of intention to seek default judgment was given on June 4, and default was entered by the clerk on June 25.

Indeed, petitioners showed a complete lack of diligence in pursuing any facet of their antitrust suit. No amended complaint was ever filed or offered for filing. No discovery of any kind was ever sought by petitioners.

Motions to dismiss the complaint were filed as early as April 14. On June 12, petitioners filed a substitution of attorneys and the hearing on the motion to dismiss was adjourned to allow them additional time to prepare their response. Both sides filed numerous briefs but petitioners still did not attempt to amend their complaint or seek any

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[5] Complaint, ¶¶ 21-23.

[6] *Ibid.* Petitioners' solitary attempt to bring their case within the ambit of the federal antitrust laws was through ¶ 4 of the complaint, which the lower courts treated as a generalized conclusion, contradicted by the more specific allegations of the complaint.

[7] Unless otherwise stated all dates herein are in 1969.

discovery or adduce any evidence of any kind. With the exception of their briefs, petitioners never filed a written response traversing the points raised by the motions to dismiss, as required by the rules, but countered with a motion to dismiss the counterclaim, on which default had been entered.

Allowing both sides unlimited time, and setting aside the entire morning for that purpose, the District Court heard oral argument on July 24.[8] Although petitioners' counsel claimed to contemplate only two amendments to the complaint, both of which were suggested to the court for consideration,[9] an amended complaint was not brought to the hearing, and no discovery was asked for.

From the filing of the first motion to dismiss (April 14) petitioners had more than a hundred days in which to prepare for the hearing on the dismissal motion (July

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[8] The hearing included argument on a cross-motion to dismiss Summit Associates' counterclaim. Because there were no independent jurisdictional grounds to support it, the counterclaim was automatically dismissed with the complaint.

[9] *"Petitioners' counsel*: * * * [O]h, incidentally, Your Honor, I don't know if this is quite a right time to bring this up. * * * There are two or three additional allegations that are not in there now that I would like to put in.

"The Court: With reference to what?

"Petitioners' counsel: I would like to put in an allegation of use of newspaper advertising in interstate commerce * * *.

"Then I think that there will probably be an allegation of fraudulent concealment and there may be one or two other changes."

Quoted from *Transcript of Proceedings of July 24, 1969* (U.S. District Court, E.D. Mich), pp. 29-30.

Upon further questioning by the Court, petitioners' counsel elaborated on the advertising amendment: "Well, Your Honor, the one I had in mind was the *Michigan Daily*. They get people who write in and say we want to rent an apartment, will you send us a short description." *Id.* at 41.

24). They did nothing during that time to support the totally defective jurisdictional allegations of their complaint.

On July 25, the United States District Court for the Eastern District of Michigan, Judge Kaess presiding, granted respondents' motion and dismissed the complaint for lack of subject matter jurisdiction on the ground that the interstate commerce requirements of the Sherman Act had not been met.

On August 21, petitioners appealed to the United States Court of Appeals for the Sixth Circuit, where the matter was fully briefed and argued on December 15.[10] In a *per curiam* opinion filed on February 20, 1970, the Court of Appeals affirmed the judgment of the District Court.

By their petition for a writ of certiorari, petitioners now seek a third hearing on their complaint, even though four judges of two lower courts have heard the same arguments and have agreed unanimously that petitioners failed to plead a Sherman Act case.

The petition fails to point out that, concurrent with these proceedings, there is an additional suit pending in

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[10] At page 7 of the Petition it is inferred that the Court of Appeals gave short shrift to petitioners' appeal by "accelerating the briefing schedule * * *." The time for filing petitioners' brief was not accelerated and petitioners used the full 40 days provided for by Fed. R. App. P. 31. The only briefing schedule accelerated was that of respondents', who had been granted a time extension from the Court due to their counsel's absence from the country, only to have such extension revoked when petitioners requested oral argument of respondents' motions to affirm or dismiss the appeal. The Court also allowed petitioners the full 15-day period provided by the rule for filing of a reply brief. Petitioners not only filed a reply brief but filed other papers with the Court of Appeals after argument was had. It cannot be gainsaid that petitioners had every opportunity to present their case and were extended every courtesy by both of the lower courts.

the State courts where, by way of counterclaim, the student-tenants make the same charges they do here, but under the Michigan antitrust laws.[11]

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW WAS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT.

Petitioners' principal argument is that the Court of Appeals' decision is in conflict with *Burke v. Ford*, 389 U.S. 320 (1967), a decision which petitioners misinterpret to have abandoned the substantiality requirement of the affectation doctrine of jurisdiction under the Sherman Act (Pet. Cert. 12-13). On the contrary, *Burke* is in the mainstream of antitrust law and applied the well-settled test that restraints on competition must either occur in interstate commerce or substantially affect interstate commerce. *United States v. Employing Plasterers Association*, 347 U.S. 186 (1954); and *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

The *Burke* case involved a horizontal division of markets among *all* liquor wholesalers in Oklahoma. Such restraint of trade "inevitably affected interstate commerce" because *all* liquor sold in Oklahoma was distilled outside of the state. 389 U.S. at 322. Petitioners here have transformed this Court's decision in *Burke* to mean that, as a matter of law, all restraints on local competition affect

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[11] *Apartments Limited, Inc., et al. v. Stuart Katz, et al.*, Washtenaw County Circuit Court, Civil Action No. 4112. There the parties made various pre-trial motions which were denied. Pending determination of interlocutory cross appeals by the Michigan Court of Appeals, all other matters therein have been held in abeyance.

interstate commerce (Pet. Cert. 12, 27). The Sherman Act does not condemn restraints having a less than substantial effect on interstate commerce. *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *United States v. Oregon State Medical Society*, 343 U.S. 326 (1952); *Page v. Work*, 290 F. 2d 323 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961); and *Elizabeth Hospital, Inc. v. Richardson*, 269 F. 2d 167 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959).

The conflicting theories of antitrust law advanced in the petition are not so novel as they are erroneous.[12] Petitioners' misunderstanding of the *per se* rule and their confusion of the jurisdictional and anticompetitive issues results in a highly artificial and academic question which, for that reason alone, need not be unravelled by this

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[12] Without attempting to consider all of petitioners' mistatements of law, and of those that will not be discussed in the body of this argument, respondents signal the following:

(1) That a local businessman's use of the interstate mails automatically confers Sherman Act jurisdiction over him (Pet. Cert. 10). The law is otherwise. *Lieberthal v. North Country Lanes, Inc.*, 332 F. 2d 269, 270-271 (2nd Cir. 1964).

(2) That advertising in newspapers circulated out of state confers federal antitrust jurisdiction (Pet. Cert. 28). The law is otherwise. *Page v. Work*, 290 F. 2d 323 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961).

(3) That the movement of out-of-state students to Ann Arbor to attend the University of Michigan confers such jurisdiction over Ann Arbor landlords (Pet. Cert. 16). The free movement of persons across state lines, where they then do business with local merchants, has never been deemed to bring such merchants within the compass of the Sherman Act. *Elizabeth Hospital, Inc. v. Richardson*, 269 F. 2d 167 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Evanston Cab Co. v. Chicago*, 325 F. 2d 907 (7th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964); and *Spears Free Clinic v. Cleere*, 197 F. 2d 125, 126 (10th Cir. 1952).

(4) That the threshhold jurisdictional question was for a jury (Pet. Cert. 22-23). Subject matter jurisdiction is a judicial determination. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936); *Haley v. Childers*, 314 F. 2d 610, 613 (8th Cir. 1963); and 5 Moore's Federal Practice (2d Ed. 1969) ¶ 38.36, at p. 291.

Court.[13] *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

II.

THE DECISION BELOW WAS FUNDAMENTALLY CORRECT.

Both lower courts agreed that petitioners had not pleaded jurisdictional facts under the Sherman Act, and the petition for a writ of certiorari does not show that "very obvious and exceptional error" needed to warrant review of their complaint a third time. *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

Petitioners depart from reality when they repeatedly intimate (Pet. Cert. 7, 23, and 27) that the Sixth Circuit ignored its earlier decision in *Bratcher v. Akron Area Board of Realtors*, 381 F. 2d 723 (6th Cir. 1967). No case was more fully briefed and argued to the Sixth Circuit than its decision in *Bratcher*. The briefs filed below thoroughly considered *Bratcher*, and a substantial portion of the oral argument in both lower courts was devoted to that decision. Moreover, in the Court of Appeals, counsel for both sides adopted the Government's *amicus curiae* briefs in *Bratcher* as correctly stating the applicable law.

While an intracircuit conflict is not reviewable on certiorari,[14] there is no conflict between *Bratcher* and the

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[13] "The basic question which has never really been decided concerns the necessary relation between the reach of the interstate commerce clause and the reach of the Sherman Act." (Pet. Cert. 17.) Petitioners' baffling analysis of the *per se* rule (*Id.* at 13), and dissection of competition from interstate commerce (*Id.* at 16), except when it suits their purposes to merge them (*Id.* at 22), is so theoretical that the narrow issue involved in this case has been lost sight of, as petitioners admit when they suggest that the Court should use this case "to clarify the nature of the extent of the Sherman Act." (Pet. Cert. 24.)

[14] "It is primarily the task of the Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

instant decision.[15] *Bratcher* involved racial discrimination in the sale of Akron, Ohio residential property, and, because Negroes were effectively prevented from moving to Akron, interstate commerce in building materials and supplies was hindered and interstate mortgaging and financing was restrained. The theory applicable there was well articulated by this Court in *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964), where it was pointed out that local racial discrimination unquestionably impedes interstate travel by "a substantial portion of the Negro community." *Id.* at 252-253.

Because the real estate business is inherently local in character,[16] it requires unusual circumstances such as racial discrimination to bring a conspiracy of realtors within the scope of the federal antitrust laws. *Contract Buyers League v. F. & F. Investment,* 300 F. Supp. 210 (N.D. Ill. 1969); and *Cotillion Club, Inc. v. Detroit Real Estate Board,* 303 F. Supp. 850 (E.D. Mich. 1964). There are no such circumstances in the case at bar, and further, respondents are not realtors substantially affecting an interstate building or financing market; rather they are property managers who rent apartments on behalf of various owners.

The remarkable claim urged before the Sixth Circuit, and now before this Court (Pet. Cert. 28), that this case is governed by the mere allegations in the complaint pres-

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[15] There was in fact an overlapping of panels, Chief Judge Phillips sitting in both cases.

[16] *United States v. National Association of Real Estate Boards,* 339 U.S. 485 (1950); *10 East 40 St. Building, Inc. v. Callus,* 325 U.S. 578, 582-583 (1945); *Gaylord Shops, Inc. v. Pittsburgh Miracle Mile T. & C. Shopping Center,* 219 F. Supp. 400 (W.D. Penn. 1963); and *Orth v. Lauther,* 170 N.E. 2d 313, 315 (Ohio App. 1953).

ently pending in *United States v. Prince George's County Board of Realtors,* Civil Action No. 21545 (D.C. Md. 1969),[17] cannot be seriously contended for. That case involves a multi-county conspiracy of a thousand real estate brokers and salesmen in a geographical area serving as a bedroom community for a multitude of persons employed in our Nation's Capitol.[18]

Petitioners' argument that out-of-state students supply the necessary interstate commerce ingredient in this case is without sound support. An interstate traveler who spends an hour in a local taxicab between terminals does not thereby subject the taxicab company to Sherman Act jurisdiction. *United States v. Yellow Cab Co.,* 332 U.S. 218 (1947); and *Evanston Cab Co. v. Chicago,* 325 F. 2d 907, 912 (7th Cir. 1963), *cert denied,* 377 U.S. 943 (1964). It thus strains credulity to suppose that an out-of-state student attending the University of Michigan, and choosing to live in private off-campus housing, and being an Ann Arbor resident for four or so years, does what one whose luggage remains packed does not do. Higher education may be "big business" (Pet. Cert. 24) but it is not that business which is here before the Court.

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[17] Quoted at 38 U.S.L.W. 2352; and 5 CCH Trade Reg. Rep. ¶ 45,069 (Case No. 2078).

[18] As is reflected by the allegations of ¶ 8 of the complaint in that case, the suit was filed in federal court "[b]ecause of the transient nature of a significant portion of the population of the Metropolitan Washington, D.C. area, of which Prince George's County forms a part * * *." The analogy breaks down when one tries to compare a transient government worker with a student who decides he would prefer to leave his home state and get a four year education at the University of Michigan. Such a student, under any definition, is not a transient.

III.

DISMISSAL OF THE COMPLAINT WAS WHOLLY PROPER

In summing up their argument, petitioners assert that they were not allowed to introduce evidence and were not allowed to amend their complaint (Pet. Cert. 29). Neither charge is faithful to the proceedings below.

First, petitioners never sought discovery of any kind and never requested the opportunity to adduce evidence in opposition to the motion in the District Court, as was available to them under Fed R. Civ. P. 43(e). Further, in the Court of Appeals petitioners did submit affidavits in an attempt to resist respondents' motions to affirm or dismiss. Therefore, it simply is not true "that they have *not been allowed to introduce evidence* on jurisdictional facts." (Emphasis petitioners'. Pet. Cert. 25.)

Second, although petitioners never saw fit to prepare an amended complaint, their counsel suggested amendments to the District Court in oral argument,[19] which were considered and found wanting by that court. In the Court of Appeals these same amendments were again urged in oral argument and, at the invitation of the Chief Judge, respondents' counsel stipulated in open court that the proffered oral amendments ("newspaper advertising", use of "interstate mails") could be considered as part of the complaint and deemed to be true. On this record petitioners' claim that they were not allowed to amend is unwarranted.

Petitioners' suit was not one which could be bottomed on the Sherman Act—indeed, a separate state action is now pending—and it was proper for the lower courts to disregard the naked conclusion of ¶4 of the complaint that

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[19] The colloquy between petitioners' counsel and the District Court is quoted in footnote 9, *supra*.

interstate commerce was somehow involved. *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U.S. 54, 57 (1937); and *Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935). Conclusions respecting interstate commerce are viewed in the light of factual allegations. *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 277 (1936). And where the well-pleaded facts show the jurisdictional conclusions to be without substance the complaint must be dismissed. *Haley v. Childers*, 314 F. 2d 610, 613 (8th Cir. 1963); *Sexton v. Barry*, 233 F. 2d 220 (6th Cir. 1956); and *United Grocers' Co. v. Sau-Sea Foods, Inc.*, 150 F. Supp. 267, 270 (S.D. N.Y. 1957).

Finally, petitioners' concluding remark that "they have not burned banks, boycotted class, protested, demonstrated or disrupted the university" but have, through their suit, given the courts an opportunity to rectify "a typical 'establishment' evil" (Pet. Cert. 29), can not be accepted in view of the Ann Arbor rent strike which has continued since February of 1969, and which involves the removal of rental monies from the jurisdiction of state and federal courts to the Windsor, Ontario branch of the Bank of Montreal, in violation of Michigan landlord-tenant law.[20]

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[20] Act No. 286 of the Michigan Public Acts of 1968. MSA §5. 2891(1), *et seq.*; MCLA §125.521, *et seq.* Petitioners' counsel conceded that this removal of rental monies was contrary to Michigan law respecting the establishment of rental escrow funds. *Transcript of Proceedings of July 24, 1969* (U.S. District Court, E.D. Mich), pp. 24-25. At the crest of the strike Ann Arbor tenants had unlawfully withheld and removed approximately $200,000.00 in rents. As a consequence of their actions many private landlords brought hundreds of separate suits in the state courts; and petitioner Zwerdling admits that an objective of the strike was to hamstring the courts. See Exhibit B to respondents *Motions to Affirm or Dismiss and Alternative Motion for Order Compelling Appellants to do Equity and Return Rental Monies Removed from the Jurisdiction of the Court*, filed in the Court of Appeals on October 8, 1969. Considering this massive nonpayment of rent, petitioners' allegation in ¶ 24 of their complaint that Ann Arbor tenants "have been forced to pay substantially higher rents than they would have if the market had been competitive" must be ascribed as sheer audacity.

In short, petitioners' crusaders' garb is decidedly threadbare, and in no wise can it clothe their complaint with Sherman Act jurisdiction.

The lower courts were correct in dismissing petitioners' complaint as failing to plead a Sherman Act case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 15, 1970

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